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No. 99-960

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The court of appeals has held an Act of Congress unconstitutional, and its ruling is inconsistent with the decision of the Ninth Circuit in *Legal Aid Society of Hawaii (LASH)* v. *Legal Services Corp.*, 145 F.3d 1017 (White, J.), cert. denied, 119 S. Ct. 539 (1998). The court of appeals' decision therefore warrants review by this Court. Respondents' various contentions that certiorari should nonetheless be denied are without merit.

1. The Legal Services Corporation Act (LSC Act), 42 U.S.C. 2996 *et seq.*, authorizes the Legal Services Corporation (LSC) to make grants to individuals and organizations for the purpose of providing legal assistance to persons who are financially unable to afford legal assistance. The LSC Act has, from the outset, limited LSC financial support in many ways, including, for example, prohibiting any LSC-funded

representation in criminal proceedings or the use of any LSC funds, personnel, or equipment in any political campaign. 42 U.S.C. 2996b(a), 42 U.S.C. 2996e(d)(3) and (4). The provision at issue here arises out of a general prohibition against participation by LSC fund recipients in litigation, lobbying, or rulemaking involving an effort to reform a federal or state welfare system. Congress created an individual-benefits exception to that prohibition, allowing recipients of LSC funds to represent individual eligible clients who are seeking specific relief from a welfare agency, but only "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321-55 to 1321-56. LSC fund recipients remain free to engage in such activities by conducting them with non-LSC funds through an independent affiliate. See U.S. Pet. 8.

The court of appeals incorrectly held that the exception allowing representation in certain individual cases seeking relief from welfare agencies under existing law constitutes impermissible viewpoint discrimination. Respondents embrace that ruling, contending (Br. in Opp. 5-9) that the reasoning of *Rust* v. *Sullivan*, 500 U.S. 173 (1991), should not apply to this case and that the case is most analogous to *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

As we have previously explained,* however, respondents' attempted distinction of *Rust* does not hold up. Contrary to respondents' claim (Br. in Opp. 7), the

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* See U.S. Br. in Opp. at 20-21, *Velazquez* v. *Legal Servs. Corp.*, No. 99-604.

United States does not view the government as "the true 'speaker' in this case, using Legal Services lawyers as spokespersons to convey a pre-selected government message, just as doctors were allegedly used in *Rust*." The counseling by doctors and other persons employed by family planning organizations that received Title X funds in *Rust* was not government speech. It was private, professional counseling rendered within the confines of a federally assisted program. The same is true here. The legal representation by lawyers employed by LSC fund recipients is not government speech. It is private, professional representation rendered within the confines of a federally assisted program.

For that same reason, respondents err in contending (Br. in Opp. 8) that the purpose of the LSC Act is to subsidize "lawyers' speech," and in claiming (*id.* at 7) that the United States has thereby "elected to subsidize the speech-related activities of numerous private persons in order to enable poor litigants to oppose the government effectively in court." An LSC-funded lawyer makes legal arguments on behalf of his or her client to advance the *client*'s interest in the particular case in which the lawyer is representing that client, not to exercise some general speech right of the *lawyer* in expressing his or her own views about government policy or laws.

As for respondents' reliance on *Rosenberger*, the program at issue there was very different from the programs at issue in *Rust* and here. It was designed to encourage diverse private expression, and the Court held that the University had, in effect, created a limited public forum for such private expression. 515 U.S. at 829-830; see *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 586 (1998); see also *id.* at 598-599

(Scalia, J., concurring in the judgment) (noting that *Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum").

The LSC program, by contrast, does not create a public forum and is not dedicated to the promotion of diverse private expression in such a forum—it exists to subsidize certain discrete legal services and activities. As the Ninth Circuit correctly held, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *LASH*, 145 F.3d at 1028. Any limitations on expression by LSC fund recipients are but an incidental result of the program's restrictions on certain types of activities that the recipient may undertake on behalf of clients. Such an incidental limitation on the use of federal funds is "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in *activities* outside of the project's scope." *Rust*, 500 U.S. at 194 (emphasis added).

Respondents also mischaracterize (Br. in Opp. 8-9) the limited, individual-welfare-benefits exception at issue here as an effort "to manipulate the permissible content of counsel's argument on the basis of viewpoint." The statutory funding restriction is couched in terms of authorizing an LSC fund recipient to represent an otherwise eligible client who is seeking specific relief from a welfare agency only if the relief sought does not involve an effort to amend or otherwise challenge existing law. 110 Stat. 1321-55 to 1321-56. As we explain in our certiorari petition (at 18), the limitation thereby prevents LSC fund recipients from engaging in representation at all if it involves a request for relief in

the form of an amendment or alteration of the existing welfare laws. The exception does not preclude an LSC fund recipient from presenting argument based on a certain viewpoint in a case; it excludes from the scope of the program the cases that seek such relief. The program thus funds efforts to obtain welfare benefits for those entitled to such benefits under current law, but not for those who do not qualify under existing law but want to take on the larger project of challenging the law itself.

2. Respondents err in contending (Br. in Opp. 9-10) that the decision below should be affirmed on statutory grounds because the provisions in the LSC Act requiring LSC fund-recipient attorneys to adhere to applicable ethical standards mean that such attorneys remain able to challenge the legality of welfare laws when they believe it is necessary to do so in order to represent their clients' interests.

Respondents' contention disregards the fact, noted above, that the limited scope of the individual-welfare-benefits exception merely has the effect of precluding an attorney employed by an LSC fund recipient from representing particular clients who seek certain forms of relief; it is not aimed at dictating the nature of the legal arguments that may be made by such an attorney on behalf of a client whose representation is not barred by the statutory funding restriction. An LSC fund-recipient attorney who is faced with a potential client whose best interests would be served by a challenge to the existing welfare law must meet his or her ethical obligations by disclosing to the client, before undertaking any representation, that he or she cannot represent the client in making that challenge. The attorney is free under the statute not only to inform the client that the representation is beyond the scope of the LSC

program, but also to refer the client to legal counsel outside the program, including any lawyer at an affiliate organization that the LSC fund recipient may have established under the LSC regulations.

3. Respondents assert (Br. in Opp. 11) that the instant case challenges the restrictions placed by Congress on the use of federal funds by LSC recipients and is, therefore, distinguishable from the decision in *LASH*, *supra*. Respondents' assertion is inconsistent with the record. The rulings of the courts below were addressed to respondents' motion for a preliminary injunction, which sought to have the LSC and others enjoined from taking adverse action against respondents "for using non-federal funds * * * to challenge the legality of welfare regulations or statutes." Notice of Motion for Class Certification and Preliminary Injunction 2 (Jan. 27, 1997); see also Memorandum of Law in Support of Motion for Preliminary Injunction 2, 19 (Jan. 27, 1997).

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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